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# Supreme Court of the United States

OCTOBER TERM, 1939

No. 201

BUCKSTAFF BATH HOUSE COMPANY *Petitioner,*

v.

Ed I. McKINLEY, as Commissioner of the  
Department of Labor of the State of  
Arkansas, et al., *Respondent.*

APPEAL FROM THE SUPREME COURT OF  
THE STATE OF ARKANSAS

REPLY BRIEF FOR PETITIONER

TERRELL MARSHALL,

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## APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

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### REPLY BRIEF FOR PETITIONER

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### STATEMENT

Petitioner directs this reply to the contention of the respondent that no justicable controversy is presented by appellant, as discussed on pages 3 to 8, inclusive, in the brief of respondent.

### ARGUMENT

This Court has held in the case of *Maryland Casualty Co. v. U. S.*, 251 U. S. 342, at page 349:

"It is settled by many recent decisions of this Court that a regulation by department of government,

addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with the express statutory provision."

The levy of unemployment compensation of 1.8% upon wages during the year 1937 by the Legislature of the State of Arkansas is of course an amount equivalent to 90% of the levy for similar purposes by the United States, and if it could have been deducted without question or doubt on the Federal return, of course it would have been immaterial to whom the tax was paid, since petitioner in no event would have suffered any loss and there would have been no issue to submit to this Court other than an abstract principle of law.

Petitioner, however, was not at that time in such a fortunate circumstance, for it was then advised of the Departmental ruling and furnished with a copy of the opinion of the General Counsel for the Social Security Board, which is set out at page 17 of the Appendix of the brief for the respondent. This Departmental ruling, whether erroneous and inapplicable, or not, nevertheless had the force and effect of law until such time as it might be rescinded or changed by positive statutory enactment. It cannot be said that at the time of its rendition it was positively and apparently in conflict with statutory enactment or prior court decision on the subject. To say the least, it was calculated to, and did, produce a substantial doubt in the mind of the petitioner as to its liability for contribution to the Arkansas State unemployment compensation fund, and a real and substantial doubt of the recovery of the amount so paid or its ultimate deductibility, if paid, in the face of this ruling.

Since the record does not show the status of the controversy after the decision by the Supreme Court of Arkansas, affecting the jurisdiction of this Court, we review the proceedings:

The original complaint was filed in the Pulaski Chancery Court on the 19th day of August, 1938, at which time the petitioner, if liable at all to the State of Arkansas for

unemployment contributions, was indebted in the amount of 1.8% of wages paid employees, plus 8% interest on past due contributions at the rate of 1% per month since January 1, 1938.

Section 8562, *Pope's Digest of the Statutes of Arkansas*, provides:

"Contributions unpaid on the date on which they are due and payable as prescribed by the Commissioner shall bear interest at the rate of one per centum per month from and after such date until payment, plus accrued interest, is received by the Commissioner. \* \* \*

Petitioner on August 19, 1938, being a lessee of the United States, found itself in the position of a tenant involved in a dispute between the landlord and a third party over sovereign title to the land which it occupied, and the lessor's consent was lacking for the tenant to render rent or service to the State of Arkansas. It could not interplead the parties claiming sovereignty, and elected to resist the demand of the State of Arkansas rather than that of the United States, under which it held as lessee.

There was no change in the ruling of the Treasury Department of the United States relative to the permissibility of contribution to a State unemployment compensation fund until the Amendment to the Social Security Act of the United States approved August 10, 1939 [Act No. 379, Section 902 (a)], which was five months subsequent to the opinion of the Supreme Court of Arkansas on April 10, 1939 (R. 11), on which date of August 10, 1939, the petitioner, if answerable at all to the State of Arkansas for unemployment compensation, owed, in addition to the levy, an amount of 20% of the principal amount as interest and which interest was as much a part of the tax as the original 1.8% of wages paid. This date of August 10, 1939, was the first time on which the lessee was given permission to contribute to the State unemployment fund, and on this date the prior ruling of the Treasury Department became inoperative, since, as said in the case of *Maryland Casualty Co. v. U. S.*, *supra*, it then became in conflict with an express statutory provision.



At a time after the first day of September, 1939, and before the 10th day of October, 1939, petitioner paid into the unemployment compensation fund of the State of Arkansas the original 1.8% of wages during the year 1937, which constituted only a partial discharge of the amount claimed to be due at that time, that is, 21% of the demand was not paid, and for which petitioner still is liable in the event it was amenable to the provisions of the Arkansas Social Security Act during the year 1937.

On the date of payment of the partial amount, the Treasury Department ruling had become inoperative by statute, as set out above, by the Amendment to the National Social Security Act, *supra*, but the amendment did not afford complete relief to the petitioner, in that a corrected return could be filed for only 90% of the amount paid into a State unemployment compensation fund. Therefore, 21% of petitioner's original liability, if any, was unaffected by said Amendment or its payment to the State of Arkansas and its subsequent amended claim filed for refund with the United States.

The respondent in its brief makes no contention contrary to this statement, and it is made for the purpose of clarifying the statement in respondent's brief at page 6 that 1.8% of wages during the year 1937 had been paid into the Arkansas unemployment compensation fund, from which this Court might infer full payment, when in fact a substantial amount of 21% of liability still existed, for which no claim for refund from the United States could be made. In other words, petitioner complied with the Amendment of August 10, 1939, only insofar as it afforded partial relief.

There is no provision under the Arkansas Social Security Act for waiver of interest due on contributions, nor is there any provision for an adjustment of this item of 21%, except that an application for adjustment may be made provided it is filed with the Commissioner not later than one year after the contribution became due.

Section 8552, *Pope's Digest of the Statutes of Arkansas*, provides:

"If not later than one year after the date on which any contributions or interest thereon became due, an employer who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof, because such adjustment cannot be made, and the Commissioner shall determine that such contributions or interest or any portion thereof was erroneously collected, the Commissioner shall allow such employer to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such adjustment cannot be made, the Commissioner shall refund said amount, without interest, from the fund."

At the time of the Amendment to the National Social Security Act, *supra*, making inoperative the Departmental ruling, this period of one year for application for refund had expired.

We cannot agree with the interpretation placed on Section 8 of the Arkansas Unemployment Compensation Act, which is Section 8556 of *Pope's Digest of the Acts of Arkansas*, in that petitioner could have elected to become an employer subject to that Act and by its election have any effect on the petitioner's status under the law of another sovereign. An election by the petitioner would have constituted nothing more than a voluntary contribution prohibited by the Treasury Department ruling, and in no event would the election be binding on the United States so as to force it to allow a credit or a deduction on its tax of 90%, and if sovereign jurisdiction has been surrendered by the State of Arkansas to the United States, this section could have no application over operations within the ceded area. This section relating to election is copied at length at page 5 of the brief of respondent.

**CONCLUSION**

We submit that the Amendment of August 10, 1939, has not afforded complete relief to the petitioner; that there is a substantial amount of 21% of liability, under the decision of the Supreme Court of Arkansas, which is claimed but undetermined; and that this amount, exclusive of costs, is real and substantial, and presents a justicable controversy for this Court, and we respectfully contend that the decision of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

**TERRELL MARSHALL,**

**E. R. PARHAM,**

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